HARINDER SINGH & ORS A

v.

FUTURISTIC BUILDERS SDN BHD

COURT OF APPEAL, PUTRAJAYA B
ABDUL KADIR SULAIMAN JCA
TENGKU BAHARUDIN SHAH JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO. W-02-647-98]
6 FEBRUARY 2006 C

SUCCESSION: *Administration - Estate - Beneficiaries - Whether beneficiaries of unadministered estate have title or interest in estate property - Whether beneficiaries of unadministered estate can pass title or interest in estate property to third parties* D

CIVIL PROCEDURE: *Pleadings - Illegality - Whether parties can consent on illegality - Issue of illegality not taken up during trial*

CONTRACT: *Mistake - Mutual mistake - Mistake of fact - Whether agreement tainted by mutual mistake void - Contracts Act 1950, s. 21* E

Ujagar Singh Bhagat Singh died leaving behind his children (the 6th to the 9th appellants) and widow (the 2nd appellant). A joint venture agreement dated 5 October 1992 ("the agreement") was entered into between the Estate of Ujagar Singh and the F respondent/plaintiff. The agreement was executed by the 6th and the 2nd appellants in their personal capacity. At the time of the execution of the said agreement, no letters of administration had been issued yet. It was issued only on 12 May 1994 to the 6th appellant as the sole administrator of the estate. The agreement G concerned certain lands ("the said lands"), owned by Ujagar Singh and provided for the development of the said lands by the respondent into a housing estate. At the material time, the express condition imposed upon the said lands did not permit the construction of residential units on them. Various steps had to be H taken before the agreement could achieve its objective.

A letter of authority dated 21 May 1992 was signed by the 3rd to the 5th and the 7th to 9th appellants as heirs of the deceased allowing the 6th and the 2nd appellants "to act on our behalf on I all matters regarding the properties, both movable and immovable" of the deceased. Letters of Administration of the Estate of Ujagar Singh was later extracted but no further steps were taken towards

A performing the agreement. The respondent filed this action in the High Court seeking specific performance of the agreement and that the said lands be transferred to the respondent. The appellants counterclaimed seeking a declaration that the agreement was null and void or alternatively for an order that the agreement
B be rescinded. The learned judge ordered specific performance of the agreement and that the appellants pay the respondent damages for breach of contract. The appellants appealed. The two main issues were the invalidity or otherwise of the agreement and the nature of remedies, if any, to be given to the respondent.

C

Held (allowing appellant's appeal)
Per Abdul Kadir Sulaiman JCA:

(1) For so long as an estate is unadministered, notwithstanding
D the grant of letters of administration, a beneficiary of the estate has no title or interest in the property. Because of the lack in the title and interest to such property, he cannot pass on the title and interest to another as if his own, notwithstanding that he is a beneficiary of the estate. This
E principle of law applies regardless of whether it involves the estate of a testate deceased or under an intestacy. At the time of the execution of the agreement no letters of administration had been issued. The said lands remained vested in Ujagar Singh's Estate. His beneficiaries had no title or interest in the
F said lands. (paras 17 & 18)

(2) Certain rights and interest in the estate by virtue of the agreement were to go to the respondent through the hands of the 6th and the 2nd appellants. Both of them did not have any valid title or interest in the said lands forming part of
G unadministered property of the deceased. Having no such title or interest in the said lands they were not in the legal position to pass on any interest to the respondent by virtue of the agreement. The agreement was invalid and unenforceable. The claim by the respondent against the appellants failed.
H (para 18)

(3) The issue of validity or otherwise of a certain transaction, is a question of law to be decided based on the pleadings and evidence presented before the court. The parties cannot
I consent on illegality. The fact that at the trial this issue was not taken up by the appellants will not make the transaction legal if it is otherwise illegal having regards to the pleadings and evidence. (para 19)

(4) At the time of the execution of the agreement each party must have in his mind that the other party was competent to enter into the agreement. Therein lies the issue of the mutual mistake of facts, which, by virtue of s. 21 of the Contracts Act 1950, if established would have rendered the agreement void. (para 23)

(5) Since the agreement was invalid and unenforceable, the appellant's counterclaim must succeed and the agreement must be rescinded. (para 26)

Bahasa Malaysia *translation of headnotes*

Ujagar Singh Bhagat Singh telah meninggal dunia dengan meninggalkan anak-anaknya (perayu-perayu ke-6th hingga ke-9) dan balunya (perayu ke-2). Satu Perjanjian Usahasama bertarikh 5 Oktober 1992 ("perjanjian tersebut") telah dimasuki di antara Harta Pusaka Ujagar Singh dan responden/plaintif. Perjanjian tersebut telah ditandatangani oleh perayu-perayu ke-6 dan ke-2 dalam kapasiti persendirian mereka. Pada masa penandatanganan perjanjian tersebut, surat kuasa mentadbir belum lagi dikeluarkan. Ianya hanya dikeluarkan pada 12 Mei 1994 kepada perayu ke-6 sebagai pentadbir tunggal harta pusaka itu. Perjanjian tersebut adalah berkenaan dengan beberapa bidang tanah ("tanah-tanah tersebut"), yang dimiliki oleh dan telah memperuntukkan untuk pemajuan tanah-tanah tersebut oleh responden sebagai satu projek perumahan. Pada masa yang matan, syarat nyata yang dikenakan pada tanah-tanah tersebut telah tidak membenarkan pembinaan unit-unit perumahan di atas tanah-tanah tersebut. Oleh itu, beberapa langkah telah perlu diambil sebelum perjanjian itu dapat mencapai tujuannya.

Satu surat memberi kuasa bertarikh 21 Mei 1992 telah ditandatangani oleh perayu-perayu ke-3 hingga ke-5 dan ke-7 hingga ke-9 sebagai waris-waris simati membenarkan perayu-perayu ke-6 dan ke-2 untuk bertindak bagi pihak mereka dalam semua hal yang berkaitan dengan semua harta bolehalih dan tidak bolehalih simati. Surat kuasa mentadbir untuk harta pusaka Ujagar Singh telah kemudiannya diekstrakkan tetapi tiada langkah-langkah seterusnya diambil untuk melaksanakan perjanjian tersebut. Responden telah memfailkan tindakan ini di Mahkamah Tinggi menuntut pelaksanaan spesifik perjanjian tersebut dan bahawa tanah-tanah tersebut dipindahmilik kepada responden. Perayu-perayu telah membuat tuntutanbalas menuntut satu deklarasi bahawa perjanjian tersebut adalah terbatal dan tidak sah atau

secara alternatifnya untuk satu perintah bahawa perjanjian tersebut dibatalkan. Hakim yang bijaksana telah memerintahkan pelaksanaan spesifik perjanjian tersebut dan bahawa perayu-perayu membayar kepada responden gantirugi untuk kemungkiran kontrak. Perayu-perayu telah merayu. Dua isu utama ialah mengenai kesahan atau sebaliknya perjanjian tersebut dan jenis remedi, jika ada, yang perlu diberikan kepada responden.

Diputuskan (membenarkan rayuan perayu-perayu)
Oleh Abdul Kadir Sulaiman HMR:

(1) Selama sesuatu harta pusaka itu masih belum ditadbirkan, tidak kira bahawa surat kuasa mentadbir telah diberikan, seseorang benefisiari harta pusaka itu tidak mempunyai hak atau kepentingan dalam harta tersebut. Oleh kerana ketiadaan hak atau kepentingan dalam harta tersebut, dia tidak boleh menyampaikan hak atau kepentingan itu kepada orang lain seolah-olah hak dan kepentingan itu kepunyaannya sendiri, tidak kira bahawa dia adalah seorang benefisiari dalam harta pusaka itu. Prinsip undang-undang ini terpakai tidak kira sama ada ianya melibatkan harta pusaka simati yang berwasiat atau tidak berwasiat. Pada masa penandatanganan perjanjian tersebut, tiada surat kuasa mentadbir dikeluarkan. Tanah-tanah tersebut masih tetap terletakhak di dalam harta pusaka Ujagar Singh. Benefisiari-benefisiarinya tidak mempunyai hak atau kepentingan dalam tanah-tanah tersebut.

(2) Beberapa hak dan kepentingan dalam harta pusaka itu, melalui perjanjian tersebut, perlu diserahkan kepada responden melalui tangan perayu-perayu ke-6 dan ke-2. Kedua-dua mereka tidak mempunyai sebarang hak atau kepentingan yang sah dalam tanah-tanah tersebut yang adalah sebahagian daripada harta yang belum ditadbir kepunyaan simati. Oleh kerana tidak mempunyai sebarang hak atau kepentingan dalam tanah-tanah tersebut, mereka tidak mempunyai kedudukan yang sah untuk menyampaikan sebarang kepentingan kepada responden di bawah perjanjian tersebut. Perjanjian tersebut adalah tidak sah dan tidak boleh dikuatkuasakan. Tuntutan responden terhadap perayu-perayu gagal.

(3) Isu kesahhan atau sebaliknya sesuatu transaksi itu adalah satu persoalan undang-undang yang perlu diputuskan berdasarkan pliding dan keterangan yang dikemukakan di mahkamah. Pihak-pihak tidak boleh bersetuju mengenai kepenyalahan undang-

undang. Semata-mata kerana pada masa perbicaraan isu ini tidak dibangkitkan oleh perayu-perayu tidak akan menjadikan transaksi itu sah sekiranya ianya sebaliknya adalah tidak sah berdasarkan pliding dan keterangan.

(4) Pada masa penandatanganan perjanjian tersebut setiap pihak mesti telah berfikir bahawa pihak yang satu lagi itu kompeten untuk memasuki perjanjian tersebut. Di sini terdapat isu silap fakta bersama, yang mana di bawah s. 21 Akta Kontrak 1950, sekiranya dibuktikan akan menjadikan perjanjian itu terbatal.

(5) Oleh kerana perjanjian tersebut tidak sah dan tidak boleh dikuatkuasakan, tuntutan-balas perayu-perayu berjaya dan perjanjian itu dibatalkan.

Case(s) referred to:
Chor Paik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 21
Rules of the Court Appeal 1994, r. 18(7)

For the appellants - Gurbachan Singh; M/s Bachan & Kartar
For the respondents - BS Sidhu (Sharon Sidhu with him); M/s BS Sidhu

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-56-96]

Reported by Amutha Suppayah

JUDGMENT

Abdul Kadir Sulaiman JCA:

[1] This is an appeal by the defendants in the court below against the decision of the learned judge made on 11 September 1998 allowing the claim of the plaintiff and dismissing their counterclaim. The notice of appeal was dated 2 October 1998. The record of appeal was filed on 6 November 1998. The order and judgment of the court of 11 September 1998 contained therein are however only in draft approved by counsel for both parties.

[2] By a notice of motion dated 24 June 1999, the respondent who was the plaintiff in the court below, filed an application to strike off the appeal on several grounds, one of which being that the record of appeal was defective for non-compliance with

A r. 18(7) of the Court of Appeal Rules 1994. The said notice of motion came up for hearing on 25 May 2000. The court dismissed the same with no order as to costs. However, on 26 March 2004 the respondent gave the appellants a notice of preliminary objection on similar grounds contained in the dismissed notice of
B motion. On 2 April 2004 the appellants filed the order and judgment of the court of 11 September 1998. In other words, from then on the appeal was ready to proceed for hearing.

[3] When the appeal was called up before us on 9 April 2004,
C both parties informed us that they have agreed that the matter concerning the preliminary objection raised by the respondent and the appeal proper would be argued by way of complete written submissions to be submitted by both parties. We agreed. Upon receipt of the said written submissions we considered them in the
D light of the evidence before us contained in the record. We are now ready to deliver our decision.

On the Preliminary Objection

[4] Having gone through the respective written submissions of
E the parties on this aspect of the matter, we unanimously agree that the preliminary objection be overruled for the reason that the three matters forming the substance of the preliminary objection were already taken up during the hearing of the motion on 25 May 2000 which has since been disposed off by the dismissal of
F the motion, and further that matters of technicalities should not be a hindrance to a proper disposal of the appeal on substance. Substantive justice should be the main consideration. We now proceed to consider the appeal on merit.

G **On The Appeal Proper**

[5] This appeal concerns a joint venture agreement of 5 October 1992 entered into between the Estate of Ujagar Singh s/o Bhagat Singh of the one part called "the owner", and Futuristic Builders Sdn. Bhd. of the other part called "the developers". But it was
H executed by the 6th and the 2nd appellants in their personal capacity. The developers are the respondent in this appeal. Ujagar Singh s/o Bhagat Singh died on 21 March 1992, leaving behind his children and widow. At the time of the execution of the said
I agreement, no letters of administration had been issued yet. It was issued only on 12 May 1994 to the 6th appellant as the sole Administrator of the Estate. The 6th to the 9th appellants are the children of the deceased and the 2nd appellant is his widow. The

agreement concerns two pieces of land held under EMR No. 4092 Lot No. 2767 and EMR No. 4093 Lot No. 2768 both in the Mukim of Setapak and District of Wilayah Persekutuan measuring approximately 1 acre 3 rood 357 poles and 1 acre 2 rood 376 poles respectively (hereinafter referred to as "the said lands"), owned by Ujagar Singh, the deceased. The purpose of the joint venture agreement is for the development of the said lands by the plaintiff into a housing estate. At the material time, the express condition imposed upon the said lands did not permit the construction of residential units on them. Hence various steps had to be taken before the joint venture agreement could achieve its objective. Of course, the agreement spelt out the various rights and obligations of each party over the said lands so as to achieve the purpose contained in it. On a specific point, the developers was to develop the said lands into a Building Estate comprising of four 10 storey blocks of twenty residential units in each block and two 15 storey blocks with 30 residential units in each block together with one basement car park for each block. Of the total number of units to be built on the said lands, the owner's entitlement would be 45 residential units and the balance of the residential units would go as the developers' entitlement.

[6] There is a letter of authority dated 21 May 1992 signed by the 3rd to the 5th and the 7th to 9th appellants as heirs of the deceased allowing the 6th and the 2nd appellants "to act on our behalf on all matters regarding the properties, both movable and immovable" of the deceased. However, the agreement though described to be between the Estate of Ujagar Singh s/o Bhagat of the one part and the plaintiff of the other part, was in fact executed by Harinder Singh s/o Ujagar Singh, the 6th appellant and Kishen Kaur d/o Mihan Singh, the 2nd appellant, not as Administrators or Executors of the Estate but in their personal capacity purportedly signing for the Estate of Ujagar Singh s/o Bhagat Singh, in the presence of Sucha Singh, an advocate and solicitor, of the one part and was executed for and on behalf of the developers, of the other part. The essence of the letter of authority of 21 May 1992 mentioned earlier signed by the heirs of the deceased was nowhere reflected in the agreement. The recital to the agreement stipulates that the land owner, Ujagar Singh s/o Bhagat Singh, the deceased, is the registered proprietor of the said lands.

[7] Before the date of the execution of the joint venture agreement, there was also another letter dated 27 June 1992 signed by the 2nd to the 9th appellants addressed to the respondent as follows:

> Dear Sir,
>
> RE: AGREEMENT FOR EMR NO. 4092 LOT NO. 2767 AND EMR NO. 4093 LOT NO.2768
>
> MUKIM SETAPAK, DISTRICT OF WILAYAH PERSEKUTUAN
>
> In consideration of you agreeing to enter into a joint venture agreement with the estate of Ujagar Singh s/o Baghat Singh, we, the undersigned do hereby covenant and undertake to do the following:
>
> (i) that upon issuance of the letters of administration and probate for the Estate of Ujagar Singh, we hereby agree to and shall cause the Administrators and/or Executors to rescind the joint venture agreement for the above property dated 12th August 1989 with M/s Hup Hin Soon Sdn. Bhd. and we shall be absolved from all liabilities incurred or to be incurred under the Joint Venture Agreement. Simultaneously with the rescission of the above Joint Venture Agreement we shall execute a new joint venture agreement with you or your nominees to develop the aforesaid land;
>
> (ii) in the event there are any other beneficiaries other than those named below, then we shall cause the new beneficiaries to consent to the execution of the joint venture agreement between you or your nominees and the Estate of Ujagar Singh. However we shall be responsible for whatever consequences that may arise as a result of the new beneficiaries;
>
> (iii) to appoint Kishen Kaur d/o Mihan Singh and Harinder singh s/o Ujagar Singh to be our authorized attorney to negotiate, deals with and sign any documents or agreements with you or your nominees.
>
> We state herein that our above undertakings and covenants shall be irrevocable.
>
> Thank you.

The essence of this letter is similarly not reflected in the said joint venture agreement of 5 October 1992 (hereinafter referred to as "the joint venture agreement").

[8] Pursuant to the joint venture agreement, the respondent entered a private caveat affecting the said Lands. Except for the extraction of the letters of administration of the Estate of Ujagar Singh s/o Bhagat Singh, and the entering of the caveat on the said lands by the developers, no further steps were taken towards achieving the purpose spelt out in the joint venture agreement. Subsequently steps were taken by the administrator of the estate to have the caveat of the respondent removed.

[9] Then on 5 February 1996, the respondent as plaintiff filed this action in the High Court on the basis of the joint venture agreement against the administrator of the estate, and eight others who are the widow and the children of the deceased. For convenience, from now on in this judgment, the appellants would be referred to as the defendants and the respondent as the plaintiff. In the suit the plaintiff sought for:

i) An Order that the Defendants do apply to the High Court Kuala Lumpur for permission of the Court to transfer the said land mentioned in the Joint Venture Agreement dated 5th October 1992 between Estate of Ujagar Singh s/o Bhagat Singh (hereinafter called 'the Owner') and Futuristic Builders Sdn. Bhd. (hereinafter called 'the Developer') and that the Defendants apply for leave of the said Court to have the said lands transferred to the Plaintiff and that the Defendant shall make such application to the Court within one (1) month from the date of this Order;

ii) Specific performance of the Joint Venture Agreement dated 5th October 1992;

iii) An Order and/or a Declaration that all the relevant documents are to be drawn within two (2) weeks from the date of the order by the High Court by the Defendant's Solicitors, Messrs Inderjit Singh and/or any other Solicitors to effect the transfer of the said lands held under EMR No. 4092 Lot No 2767 and EMR No. 4093 Lot 2768 both in the Mukim of Setapak, District of Wilayah Persekutuan measuring approximately 1 acre 3 rood 357 poles (collectively called 'the said Lands') to the Plaintiff and if the Defendants neglect or refuse or are out of jurisdiction, the Senior Assistant Registrar of the High Court Kuala Lumpur be directed to execute the same on behalf of the Defendants;

iv) All necessary and consequential Orders and Directions as the Honourable Court may deem fit to provide;

A v) Damages for breach of contract in addition to specific performance, and the 'said Lands' to be valued by a licensed valuer to be appointed by the Plaintiff whose decision as to the market value of the said Lands shall be binding on the parties to the Joint Venture Agreement dated the 5th day of October, 1992;

B

vi) Interest at 8% per annum on such damages from the 5th day of October 1992 until the date of realization and that the damages shall be calculated according to the valuation of the said Lands by a licensed valuer on the date of the award;

C

vii) Costs of this action to be taxed and to be paid by the Defendants to the Plaintiff;

viii) Such further or other relief as the Honourable Court may deem fit to provide.

D

[10] To the claim of the plaintiff the defendants counterclaimed. The remedy sought was:

a) for a declaration that the Joint Venture Agreement dated 5/10/92 is hereby declared null and void.

E

b) alternatively for an order that the Joint Venture Agreement dated 5/10/92 be rescinded.

c) for an order that the two titles Kuala Lumpur GM 163 and 164 (EMR 4093 and 4092) for Lots 2767 and 2768 be

F returned to the Defendants forthwith.

d) damages

e) Cost of this action

G f) such further and other relief as this Honourable Court may deem fit to provide.

[11] The matter went for hearing before the learned judge and on 11 September 1998 he made the following orders:

H (i) bahawa Mahkamah memerintahkan perlaksanaan spesifik Perjanjian Joint Venture bertarikh 5 haribulan Oktober 1992 terhadap Defendan-Defendan dengan kebebasan diberikan kepada Plaintif untuk memohon lain-lain perintah (consequential order); dan

I (ii) bahawa Defendan-Defendan membayar kepada Plaintif gantirugi untuk perlanggaran kontrak bersama dengan perlaksanaan spesifik, dan gatirugi tersebut akan ditafsirkan oleh Penolong Kanan Pendaftar, dan tanah (EMR 4092 Lot

2767 dan EMR 4093 Lot 2768 Mukim Setapak., Daerah Wilayah Persekutuan) dinilai oleh penilai berlesen yang dilantik oleh Plaintif dan keputusannya berkenaan dengan nilai pasaran tanah tersebut akan mengikat parti-parti Perjanjian Joint Venture bertarikh 5 haribulan Oktober 1992, dan

(iii) bahawa Defendan-Defendan membayar kepada Plaintif faedah pada kadar 8% setahun di atas gantirugi tersebut daripada 5 haribulan Oktober 1992 sehingga tarikh penyelesaian dan bahawa gantirugi akan dikira menurut penilaian tanah tersebut (EMR 4092 Lot 2767 dan EMR 4093 Lot 2768 Mukim Setapak, Daerah Wilayah Persekutuan) oleh penilai berlesen pada tarikh awal diberi; dan

(iv) bahawa kos tindakan ini dicukai dan dibayar oleh Defendan-defendan kepada Plaintif; dan

(v) bahawa tuntutan balas Defendan-Defendan ditolak dengan kos.

[12] Hence, the present appeal before us by the defendants. The memorandum of appeal contains 7 grounds for going against the decision of the learned judge but they can be generalized into two main issues which are the invalidity or otherwise of the joint venture agreement and the nature of remedies if any to be given to the plaintiff. We shall first deal with the invalidity issue. If we are with the defendants then this appeal is resolved without us having to deal with the issue of the nature of remedies to be given to the plaintiff.

[13] On the issue of invalidity, it is the submission of the learned counsel for the defendants that the joint venture agreement does not create any valid or enforceable contract as at the date of its execution there was no letters of administration in respect of the Estate of Ujagar Singh issued or granted. It was only granted on 4 January 1994 and extracted on 12 May 1994. There was no fresh or new joint venture agreement executed after the grant or extraction of the same. Reliance is placed on the Federal Court decision of *Chor Paik Har v. Farlim Properties Sdn. Bhd.* [1997] 4 CLJ 393. Clearly therefore, when they executed the joint venture agreement, the 6th and the 2nd defendants had no *locus standi* or legal capacity to contract for and on behalf of the Estate of Ujagar Singh. For the plaintiff, the learned counsel submits in reply that the reliance on the said Federal Court decision is misconceived as the facts of that case are totally distinguishable from the facts of the present appeal. The case concerned two sale and purchase

agreements executed by the executors of the beneficiaries of the estate of the deceased. At the date of the execution of the sale agreements the administration of the estate of the deceased had not been completed. The Federal Court held that until his estate had been fully administered by the administrators and distribution made according to law, the beneficiaries had no interest or property in the estate of the deceased so as to give them any title to the lands and therefore the beneficiaries could not have covenanted to convey any title. In the present case there is no sale and purchase agreement by the administrator or by the beneficiaries of the Estate of Ujagar Singh as the joint venture agreement clearly stipulates that cls. 2, 3, 4, and 6(b) thereof were only to operate when the defendants had complied with cls. 1.1 and 14(b) thereof. Therefore, after 12 May 1994 when the letters of administration was extracted the defendants were fully in a position to comply with cl. 14(b) of the joint venture agreement but had failed or refused to do so. It is not in dispute that the defendants are the only beneficiaries and the circumstances were such that when the time comes for completion of the joint venture agreement, the defendants are in a position to act in accordance with the joint venture agreement.

[14] To decide on the issue raised by the counsel for both sides, it is necessary for us to look at the Federal Court case cited. To start with, it is a case involving an application to remove a caveat placed upon the subject land under the National Land Code 1965. The issue for determination is whether the applicant/caveatee is a person aggrieved and could therefore, apply for the caveat to be removed. The facts of that case as stated in the headnote are as follows:

> By an agreement dated 4 January 1943 ('the 1943 agreement) between Chor Bah Say ('the deceased') and Choong Lye Hock Estate Sdn Bhd ('the company'), the deceased acquired ¾ undivided shares in Ayer Itam Estate, which included two pieces of land ('the lands'). The deceased died intestate on 9 November 1949. Upon his death, his interest under the 1943 agreement devolved to and became vested in his estate. The appellant was the remaining direct beneficiary of the deceased's estate.
>
> By two sale and purchase agreements ('the sale agreement') between the company and the executors of the beneficiaries of the estate of the deceased on the one part and the respondents on the other part, the former agreed to sell the lands to the latter for RM32,006,000. The appellant refused to execute the sale

agreements. The appellant then entered a private caveat against the lands. The respondents applied to the High Court for the removal of the caveat under s 327 of the National Land Code 1965 ('the Code') submitting that by virtue of the sales agreements, they were 'person aggrieved' and could apply to remove the caveat. The learned judge granted the respondents' application. The appellant appealed. A B

The appellant submitted that the respondents could not rely on the sale agreements to justify their status as an aggrieved party because the sale agreements had no validity since the estate of the deceased was unadministered at the date of the sale agreements. He submitted that in law, a beneficiary of an unadministered estate had no title or interest in the property of the deceased person before administration was complete. Therefore, so long as the estate of the deceased remained unadministered, the beneficiaries did not have and could not acquire the title to the ¾ undivided shares of the lands at the date of the sale agreements and thus, the beneficiaries could not have covenanted to convey such title to the respondents under the sales agreements. The respondent argued otherwise and submitted that the concept of a residuary beneficiary was limited to the estate of a testate deceased, and did not apply to a beneficiary on intestacy where the interest of a beneficiary of an intestate estate was predetermined by law. C D E

Held, allowing the appeal:

It could be concluded that in law, a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate. F

Having regard to the circumstances of the whole case, it was clear that at the date of the execution of the sale agreements, the administration of the estate of the deceased had not been completed. It follows that until his estate had been fully administered by the administrators and distribution made according to law, the beneficiaries had no interest or property in the estate of the deceased so as to give them any title to the lands. Therefore, the beneficiaries could not have covenanted to convey any title to the respondents. In the result, the respondents could not rely on the sale agreements to justify their status as 'person aggrieved' under s. 327 of the Code. For the above reasons, the respondents had not satisfied the court that there were sufficient grounds in law or fact for treating them as persons claiming an interest in the lands as would, if it were established, make them G H I

A aggrieved by the existence of the caveat (see pp 196B and 197F-H); *Eng Mee Yong & Ors v. V Letchumanan* [1979] 2 MLJ 212 followed.

[15] In allowing the appeal, Mohamed Dzaiddin FCJ (delivering the judgment of the Federal Court) after having considered various B case authorities and the views of learned authors in various textbooks on the subject, said at p. 402:

> Based on the above commentaries, founded no doubt on the analogous principle of law concerning testate succession, it is our C conclusion that in law, a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate.

D **[16]** Then at p. 404, His Lordship continued:

> Having regard to the above observation and the circumstances of the whole case, we are satisfied that at the date of the execution of the sale agreements, the administration of the estate of Chor Bah Say has not been completed. It follows that until his estate E has been fully administered by the administrators and distribution made according to law, the beneficiaries has no interest or property in the estate of Chor Bah Say so as to give them any title to the lands. Here, we agree with counsel for the appellant that the beneficiaries of his estate, being vendors of the lands F under the sale agreements could not have covenanted to convey any title to the respondents. In the result, the respondents cannot rely on the sale agreements to justify their status as 'person aggrieved' under s. 327 of the Code. For the above reasons, we are of the opinion that the respondents have not satisfied us that there are sufficient grounds in law or fact for treating them as G persons claiming an interest in the lands as would, if it were established, make them aggrieved by the existence of the caveat (*Eng Mee Yong & Ors v. V Letchumanan* [1979] 2 MLJ 212 at p 215).

H **[17]** As stated earlier, the learned counsel for the plaintiff has informed us that the reliance on the said Federal Court decision is misconceived as the facts of that case are totally distinguishable from the facts in the appeal before us. As far as the facts go, we agree they are clearly distinguishable. The matter before the I Federal Court involves the issue of a private caveat in relation to sale and purchase agreements whereas the matter before us now concerns the joint venture agreement. Suffice to say that even on a similar issue, no two facts are the same but despite the

difference, if the principle of law involved in the two cases is the same, that principle of law would apply even on difference sets of facts. Looking at the two cases side by side, in *Chor Phaik Har*, the issue to be resolved is the issue of the passing of the interest and title in the deceased's land upon his death. As far as the law goes, upon his death, his interest in the land devolved to and became vested in his estate. For so long as his estate was unadministered, notwithstanding the grant of letters of administration, a beneficiary of the estate has no title or interest in the property. Because of the lack in the title and interest to such property, he cannot pass on the title and interest to another as if his own, notwithstanding that he is a beneficiary of the estate. This principle of law applies regardless of whether it involves the estate of a testate deceased or under an intestacy.

[18] Applying that principle of law to the matter before us now, it is not in dispute that the 2nd to the 9th defendants are the beneficiaries of the Estate of Ujagar Singh. It could safely be assumed that at the time of the execution of the joint venture agreement on 5 October 1992 concerning the said lands which form part of the Estate of Ujagar Singh, they were in the process of obtaining the necessary letters of administration. Therefore, as of that date no letters of administration has ever been issued or granted let alone the starting or the completion of the administration of the Estate of Ujagar Singh. The said lands remained vested in his estate. His beneficiaries had no title or interest in the said lands. Now desirous of developing the said lands, the beneficiaries prepared the letter of authority of 21 May 1992 authorising the 6th and the 2nd defendants to act on their behalf relating to the properties of the Ujagar Singh. Bearing in mind that as of that date, the said lands were not as yet vested in them because they remained vested in the estate and far from being administered. Then came the letter of 27 June 1992 addressed to the plaintiff signed by the 2nd to the 9th defendants. That letter is contingent in nature upon the happening of future event ie, upon the issuance of the letters of administration and probate for the estate, which event has yet to happen as on the date of the execution of the joint venture agreement. Again as of the date of the letter, the beneficiaries had no valid title or interest in the said lands. Be that as it may, on 5 October 1992 the joint venture agreement was executed. Looking at the joint venture agreement, it was purportedly entered into between the Estate of Ujagar Singh and the plaintiff. Certain rights and interest in the

estate by virtue of the agreement were to go to the plaintiffs through the hands of the 6th and the 2nd defendants who put their respective signature to the agreement, not even for and on behalf of the estate but as having been signed by the estate. As for both of them, as of that date, they did not even have any valid title or interest in the said lands forming part of unadministered property of the deceased. Having no such title or interest in the said lands they were not in the legal position to pass on any interest to the plaintiff by virtue of the joint venture agreement. On such findings, our firm view is that the said joint venture agreement is invalid and unenforceable. In the view that we take, there is no alternative for us but to say that the claim by the plaintiff against the defendants must fail. The learned judge recognized as a fact that the agreement was signed by the 6th and the 2nd defendants before the issue of the letters of administration to the Estate of Ujagar Singh. But we disagree with the learned judge that it was signed as the authorized representatives of the defendants, for the reason stated earlier. From the wordings of the agreement, we cannot see any connection between it and the two letters respectively of 21 May 1992 and 27 June 1992. Going with that premise in mind, the learned judge went into the merit ignoring the evidence and para. 2 of the statement of defence put up by the defendants when he said thus at para. 5 of his judgment:

> 5(1) In their Statement of Defence at paragraph 2 the Defendants allege that the Agreement is not valid because as it was signed before the Letters of Administration was issued there was no legally constituted person or entity existed to sign it on behalf of the estate. But at the trial this issue was not taken up by the Defendants and it is manifestly clear from their Counsel's written submission that they do not dispute the validity of the Agreement on its inception and its binding effect on them. However, in their Counsel's further written submission, they contend that the Agreement is void and invalid on the ground that it was entered on a mutual mistake of fact. I decline to consider this issue because is it not pleaded.

[19] The issue of validity or otherwise of a certain transaction, is a question of law to be decided based on the pleadings and evidence presented before the court. The parties cannot consent on illegality. The fact that at the trial this issue was not taken up by the defendants, which we believe have not been so submitted by counsel before the learned judge, does not make the

transaction legal if it is otherwise illegal having regards to the pleadings and evidence before him. Be that as it may, in the court below the learned counsel for the plaintiff by his written submission, submitted that the joint venture agreement is deemed to have been signed by all the defendants who are mentioned in the authorization document dated 21 May 1992 and the document dated 27 June 1992. In the light of what we said earlier, this line of submission cannot be accepted to assume that the said joint venture agreement has been signed by all the defendants having regard to the clear wordings of the agreement itself and the absence of the nexus to connect the two documents with the agreement. Even if the nexus is there, it will not make any difference to the status of the joint venture agreement for the reason that all the defendants have no power to contract because the estate remained unadministered as at the date of the execution.

[20] Based on the erroneous assumption, the learned counsel concluded at para. 20 of his written submission found at p. 119 of the record of appeal:

> 20. We refer to paragraph 2 of the Statement of Defence wherein the Defendants allege that:
>
> > the Joint Venture Agreement dated 5.10.1992 is not valid in law as the Kuala Lumpur High Court only granted Letters of Administration to the First Defendant on 4.1.94 and extracted on 12.5.94, and further, that on 5.10.1992 when the Joint Venture Agreement was signed no legally constituted person or entity existed to sign.
> >
> > The Plaintiff and the Defendants have entered into the Joint Venture Agreement dated 5.10.1992 and it is a **binding and concluded agreement.** The agreement was signed by Harinder Singh and his mother Kishen Kaur in their **personal capacity and not in the capacity of Harinder as administrator** of the estate of his deceased father.

[21] It is true that the submission by the learned counsel for the defendants does not touch at all on the issue of their pleadings at para. 2 of the statement of defence, but more so, in the light of what was submitted by the learned counsel for the plaintiff as mentioned above taken together with the pleadings of the defendants and the evidence before it, the learned judge could not have ignored the defence of the defendants of invalidity and

unenforceability of the joint venture agreement. Assuming that the submission for the plaintiff could be accepted, but in the light of the decision in *Chor Phaik Har* which was cited by the learned counsel for the plaintiff in his submission, the title and interest in the said lands as of the date of the execution of the joint venture agreement, were not in the defendants as the property of the deceased remained unadministered and no distribution had been made. On that ground the learned judge should have held that the joint venture agreement was invalid and unenforceable. Instead he treated the agreement as valid simply for lack of submission by the learned counsel for the defendant on this issue.

[22] Be that as it may, according to the record of appeal, the hearing of the evidence in the suit ended on 6 March 1998. Parties were then directed, based on the schedule worked out, to file and serve their respective written submissions which they did. Then on 20 June 1998 the learned judge directed for a further written submissions from the parties so as to clarify certain aspects of the case. So, ultimately there were two sets of written submissions provided by the parties to the court, the main and the further written submissions before the learned judge made his decision in the case on 11 September 1998. It was in this second written submission tendered by counsel for the defendants that the issue of common mistake of facts being brought out by the defendants, which the learned judge declined to consider for the reason that it was not so pleaded.

[23] Section 21 of the Contracts Act 1950 states that where both parties to an agreement are under a mistake as to a matter of facts essential to the agreement, the agreement is void. This is what is commonly known as a mutual mistake of facts which would vitiate a contract. Take the case of this appeal. The subject matter is the joint venture agreement. The parties agreed to enter into a contract on the basis of this agreement. At the time of the execution of the agreement the question to ask is was each party competent to enter into this agreement so as to make the contract binding on both of them? Each must have in his mind that the other party is competent to do so. This agreement concerns some property owned by Ujagar Singh, since deceased. The 2nd to the 9th defendants with whom the plaintiff was going to contract with are the beneficiaries of the estate of Ujagar Singh, the deceased. There were those two letters respectively dated 21 May 1992 and 27 June 1992 by the beneficiaries giving the authority to the 6th and the 2nd defendants to act on their behalf

in matters relating to the said property of the deceased being mindful of course, of the absence of any letters of administration then but which was due to come. Armed with those factual information, the plaintiff erroneously believed that the beneficiaries through the 6th and the 2nd defendants are competent parties to contract with them in matters relating to the interest in the property of the deceased. Hence the execution of the joint venture agreement notwithstanding that the agreement stated that the contract is between the estate of the deceased and though it was supposed to be signed by the estate but in fact signed by the 6th and the 2nd defendants in their personal capacity. Hence the averment in para. 4 of the statement of claim of the plaintiff to which averment the defendants by para. 1 of their statement of defence admited:

> 4. The Firstnamed Defendant and Secondnamed Defendant are the authorized representatives of all the Defendants and they were duly appointed by all the Defendants (the beneficiaries of the Estate of the deceased, Ujagar Singh s/o Bhagat Singh) to act on their behalf in all matters regarding the properties, both movable and immovable, of Ujagar Singh s/o Bhagat Singh vide letter of authority dated 21st may 1992.

[24] But then when it comes to the averment in para. 5 of the statement of claim alleging that they signed the joint venture agreement for and on behalf of all the defendants of the one part and the plaintiff of the other part, and the averment in para. 6 of the same, the problem started when the defendants in para. 2 of their statement of defence challenged the validity of the said joint venture agreement. So therein lies the issue of the mutual mistake of facts. By virtue of s. 21 of the Contract Act 1950, if established would have rendered the joint venture agreement void.

[25] To be fair to the learned judge, the submission of mutual mistakes brought out by the learned counsel for the defendants in his further written submissions which the learned judge declined to consider was in respect of other matters. He may be right in so declining to consider on that particular matter but without the submission, he would still have to consider the issue of mutual mistakes in relation to competency of parties when it is so disclosed in the pleadings and the evidence because if established would render the agreement void. To deal with the merit relating to the matter contained in a void contract is an exercise in futility.

[26] Next we come to deal with the counterclaim of the defendants for a declaration that the joint venture agreement dated 5 October 1992 is null and void and alternatively, for an order that the agreement be rescinded. For the reasons he gave in allowing the claim of the plaintiff, the learned judge dismissed the counterclaim of the defendants. However, in the light of our findings that the joint venture agreement is invalid and unenforceable, the counterclaim of the defendants must succeed. We so order that the joint venture agreement be rescinded. No order is made as to prayer (c) and (d) of the counterclaim. As to costs, we order that the parties bear their own costs. The appeal of the defendants succeeds to that extent.

[27] In the light of our findings that the joint venture agreement is invalid and unenforceable and in the terms of the order we made, we need no longer go into the merits of the claim and the counterclaim. Appeal by the appellant is hereby allowed on terms mentioned earlier. The order of the learned judge is hereby set aside.

[28] My learned brothers, Tengku Baharudin Shah b. Tengku Mahmud JCA and Azmel b. Hj. Maamor JHC having seen the draft have given their agreement to this judgment.